IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-2004

GAYLE M. FRANZEN and GEORGE B. KRAMER,

Petitioners,

-vs-

MELVIN LEE SMITH,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

IN FORMA PAUPERIS*

PRAYER

The Respondent, Melvin Lee Smith, respectfully requests that a writ of certiorari not issue to the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, United States of America ex rel. Smith v. Rowe, is reported at 618 F. 2d 1204 (7th Cir., 1980). The opinion of the United States District Court was not published, but was adopted by the Court of Appeals.

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*Melvin Smith proceeded in forma pauperis in the District Court and in the Court of Appeals and respectfully requests leave to proceed in forma pauperis in this Court.

JURISDICTION

The Director of the Illinois Department of Corrections and the Sheriff of Kane County, Illinois, seek this Court's jurisdiction and invoke 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Did the District Court and the Court of Appeals correctly hold that Melvin Smith's privilege against self-incrimination was violated by the prosecution's use of his failure to come forward to law enforcement authorities with his alibi defense in a post-arrest and post-Miranda advisement situation?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ADDITIONAL STATEMENT OF THE CASE

Melvin Lee Smith was indicted by a Kane County, Illinois grand jury on June 3, 1974 for the March 6, 1974 armed robbery of Claudia Watson. (C. 21)[1] The indictment followed an April

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[1] (C.) refers to the Common Law Record.

29, 1974 preliminary hearing at which Smith's presence was waived by defense counsel so that the complainant's opportunity to view him there would not taint any subsequent attempt at identification. (P.H.Tr. 10-11)[2]

When the case proceeded to trial on September 30, 1974, the State's motion to compel discovery of Smith's alibi witnesses was allowed. (T.Tr. 3-22)[3] Prior to the day of trial, defense counsel had deliberately withheld giving notice of the alibi defense and the identity of the alibi witness based upon counsel's belief that the Illinois Alibi Defense statute was unconstitutional. Counsel's assessment of the statute proved to be correct. (App. at A. 17)[4] Pursuant to the court's ruling defense counsel informed the State that Betty Walls would be the defense only potential alibi witness. (T.Tr. 36)

The complaining witness, Claudia Watson, was working as a night auditor at the Hilton Inn in North Aurora, Illinois. (T.Tr. 165) At about 1:15 a.m. on March 26, 1974, while working at the counter in the front lobby, a man approached her, pointing a gun in her direction. (T.Tr. 172-173) The man told her it was a holdup, and two other men entered the lobby, one of whom was wearing a ski mask and carrying a gun. (T.Tr. 175-176) The second of these two men, identified by Ms. Watson as Melvin Smith, was according to Ms. Watson, five feet, eight inches tall. (T.Tr. 176) Since he stood on the other side of the counter from her, she could not tell whether or not this man, like the man in the ski mask, was wearing platform shoes. (T.Tr. 176)

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[2] (P.H.Tr.) refers to the record of the preliminary hearing on April 29, 1974.

[3] (T.Tr.) refers to the transcript of the trial.

[4] (App. at A.) refers to the slip opinion of the Court of Appeals reprinted as Appendix A to the Petition for a Writ of Certiorari.

Two of the men, including the one identified as Smith, came around behind the counter and Smith was handed a gun. Ms. Watson was told to open the cash register. (T.TR. 178) The man wearing a ski mask took the money out of the register, and handed it to the man identified as Smith. (T.Tr. 179) The man with the ski mask also demanded and received the money from Ms. Watson's purse. (T.Tr. 180) She was told to lie face down on the floor, (T.Tr. 180) and the men left several minutes later, whereupon she telephoned the police. (T.Tr. 184)

Five days later, on March 31, Ms. Watson viewed eight or nine photographs at the Aurora Police Department. (T.Tr. 185) She picked out two photographs, Smith's and one she thought, but was not certain, was the man in the ski mask. (T.Tr. 186) Ms. Watson studied the photographs for twenty minutes before selecting Melvin Smith's, and did so after having first selected the photograph of a Felix Benson. (P.H.Tr. II, 12-14)[5]

On September 19, 1974, nearly six months after the robbery, Ms. Watson viewed a line-up consisting of nine or ten black males, all of whom were seated, (T.Tr. 202) and selected Smith from the line-up. (T.Tr. 186-189)

On cross examination, Ms. Watson testified that the man she identified as the defendant was, on the night in question, wearing a hat with a wide brim (T.Tr. 190) which shaded the upper part of his face (T.Tr. 193) and that the overhead lights were behind the man, not shining in his face. (T.Tr. 191-192) Because of the lighting she could not be certain if the man had a mustache. (T.Tr. 193)

When questioned about the preliminary hearing, Ms. Watson recalled seeing three black men sitting in the courtroom, but but Melvin Smith was not among them. (T.Tr. 195-196)

Betty Walls, with whom Melvin Smith had been living at the

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[5] (P.H.Tr. II) refers to the record of the preliminary hearing continued to May 1, 1974.

time of the robbery, (T.Tr. 210) testified that she and Smith were at home that night, and recalled that they were up late playing cards. (T.Tr. 212)

On cross-examination Ms. Walls testified that a police officer had come to her residence the night before the trial, but she had not talked with the officer. Melvin Smith was also present at that time. (T.Tr. 225)

Melvin Smith, testifying in his behalf, recalled that he had been at home with Ms. Walls on the night of the robbery. (T.Tr. 232-233) Smith testified that he was six feet, two inches tall. (T.Tr. 233) During the April 29, 1974 preliminary hearing, Smith was sitting in the courtroom with two other black men. (T.Tr. 234) When the police officer came to interview Ms. Walls, Smith told him that he could talk with Ms. Walls in the presence of his lawyer. (T.Tr. 236)

During the State's closing and rebuttal arguments (reprinted in footnote 1 of the District Court's opinion), several comments were made by the prosecutor which is the basis of Melvin Smith's federal claim.

On January 30, 1975 a hearing was held on his post-trial motion. At this hearing Smith was represented by new counsel who argued all of the points of law on which Smith based his state court appeals and his federal habeas corpus petition. (P.T.Tr. 1-89)6 Smith, who had never been previously charged with a criminal offense of any kind, was given the lowest sentence possible under the Illinois law in effect at the time. (P.T.Tr. 90-92) His real estate bond was allowed to remain in effect during the pendency of his state appeals, (P.T.Tr. 105) and on July 24, 1978 United States District Court Judge John P. Crowley granted Mr. Smith's motion to set bond on his habeas corpus petition, allowing him to post the same real estate bond that had been used as security in the state court.

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6 (P.T.Tr.) refers to the record of the post-trial proceedings.

REASONS FOR DENYING THE WRIT

I.

THE LEGAL BASIS OF THE COURT OF APPEALS AND DISTRICT COURT DECISIONS IS FULLY CONSONANT WITH ALL RELEVANT OPINIONS OF THIS COURT.

Petitioners seek review in this Court by attempting to stretch the holdings of Jenkins v. Anderson, ___ U.S. ___, 27 Cr. L. 3147 (1980) and Raffel v. United States, 271 U.S. 494 (1926). Jenkins held that impeachment by the use of prearrest silence did not violate the Fourteenth Amendment. Jenkins v. Anderson, ___ U.S. ___, 27 Cr. L. at 3150. Being less than candid with the Court, Petitioners frame the issue in the instant case as whether the impeachment of Melvin Smith by his "pretrial silence" gave rise to constitutional error. (Petition for a Writ of Certiorari at p.6). Since the only silence with which Melvin Smith was impeached was post-arrest, post-Miranda warning silence, Jenkins does not apply. Rather, Doyle v. Ohio, 426 U.S. 610 (1976), controls this case. The distinction drawn by the Court in Jenkins between that case and Doyle, Jenkins v. Anderson, ___ U.S. at ___, 27 Cr. L. at 3150, is precisely the distinction between this case and Jenkins: To impeach with post-arrest, post-Miranda silence is fundamentally unfair and the use of such silence creates evidence which is insoluably ambiguous.

Raffel, also relied upon by the Petitioners, is not controlling. In Raffel the Court held that when on a second trial the accused took the stand and denied making a statement attributed to him by a prosecution witness, and which he had not denied making at a previous trial since he had not testified, he could be impeached with his failure to testify at the first trial. Smith, unlike the defendant in Raffel, asserted his privilege to remain silent not at a previous trial, but prior to the only trial and upon advice of counsel.

In Raffel, the defendant at his first trial had the same opportunity as at his second trial to confront and cross-examine witnesses, to be assisted by counsel, to object to incompetent evidence, and to testify and present a defense. In Smith's case, however, the prior opportunities to come forward with his alibi defense in no way resembled the protected atmosphere of trial where he chose to testify.

> The Raffel Court found that the circumstances of of the earlier confrontation naturally called for a reply . . . But the situation of an arrestee is very different, for he is under no duty to speak and, as in this case, has ordinarily been advised by government authorities only moments earlier that he has a right to remain silent, and that anything he does say can and will be used against him in court. (United States v. Hale, 422 U.S. 171, 176 (1975)).

Similarly, Melvin Smith continued to remain silent prior to trial. This is not a situation resembling Raffel where an earlier confrontation naturally called for a reply on Smith's part. As such Raffel cannot control this case.

II.

POINTS II AND III OF PETITIONERS' REASONS FOR GRANTING THE WRIT ARE SOLELY FACTUAL ISSUES.

The Petition for a Writ of Certiorari raises two wholly factual issues. Both the District Court and the Court of Appeals carefully examined the facts of this case and made findings contrary to how Petitioners would have this Court interpret the facts. Respondent believes that issues of fact, agreed upon by two lower federal courts, do not warrant the granting of certiorari.

III.

DOYLE V. OHIO HAS BEEN IMPLICITLY HELD RETROACTIVE BY THIS COURT; FURTHER, PETITIONERS HAVE WAIVED CONSIDERATION OF DOYLE'S RETROACTIVITY IN THIS CASE.

The District Court held that Doyle v. Ohio, 426 U.S. 610 (1976), should be given retroactive application if the issue of Doyle's retroactivity were before it. (App. at A. 19 n.9) Given the fact that this Court has vacated and remanded cases from state courts for reconsideration in light of Doyle, and that those cases were decided by the state courts before the Doyle opinion, it appears that Doyle has been given retroactive effect. E.g., Lebowitz v. Florida, 429 U.S. 808 (1976), vacating and remanding Lebowitz v. State, Fla. App., 313 So. 2d 473 (1975); Middleton v. South Carolina, 429 U.S. 807 (1976), vacating and remanding State v. Middleton, 266 So. C. 251, 222 S.E. 2d 763 (1976).

Furthermore, the Petitioners failed to raise the issue of Doyle's retroactivity in the Court of Appeals below, and should therefore be precluded from raising that issue here.

CONCLUSION

WHEREFORE, Melvin Lee Smith respectfully requests this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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Of Counsel

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NOTICE OF MOTION AND PROOF OF SERVICE

TO: Eugene Armentrout
State's Attorney
Geneva Courthouse
Geneva, Illinois

William J. Scott
Attorney General
188 West Randolph Street
Chicago, Illinois 60602

You are hereby notified that on July 18, 1980, we personally mailed the original and nine copies of the attached Motion to Proceed In Forma Pauperis to the Clerk of the above Court, a copy of which is hereby served on you.

RALAH RUEBNER
Deputy Appellate Defender

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

The undersigned being first duly sworn on oath, deposes and says that she personally mailed the required number of copies of the attached Motion to the Clerk of the above Court. She has also mailed one copy to the State's Attorney of Kane County and one copy to the Attorney General of Illinois this 18th day of July, 1980.

BETTY JOHNSON

SUBSCRIBED AND SWORN TO BEFORE ME
this 18th day of July, 1980.

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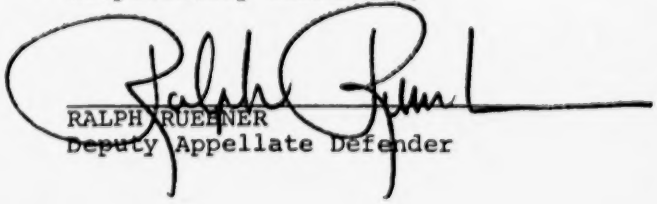
MOTION TO PROCEED IN FORMA PAUPERIS

Now comes Respondent, Melvin Smith, by court appointed counsel, Ralph Ruebner, Deputy Appellate Defender, the Office of the State Appellate Defender, and respectfully requests to proceed In Forma Pauperis and in support thereof states that he is presently indigent and that he previously proceeded as a pauper in the federal and states courts below.

Respectfully submitted,



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